

MINUTES

**MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON TAXATION

SUBCOMMITTEE ON SALES TAX

Call to Order: By **CHAIRMAN BOB DEPRATU**, on February 17, 1999 at 10:00 A.M., in Room 413/415 Capitol.

ROLL CALL

Members Present:

Sen. Bob DePratu, Chairman (R)
Sen. Bill Glaser (R)
Sen. Barry "Spook" Stang (D)

Members Excused: None

Members Absent: None

Staff Present: Sandy Barnes, Committee Secretary
Lee Heiman, Legislative Branch

Others Present: Sen. Alvin Ellis, Jr.
Jeff Miller, Department of Revenue
Terry Johnson, Legislative Fiscal Division
Jerry Leonard, Department of Revenue
Mary Bryson, Department of Revenue
Gordon Morris, Montana Association of Counties

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary: SB 143

DISCUSSION ON SB 143

Mr. Heiman distributed a table of contents for **SB 143**, **EXHIBIT (tas39b01)**.

SEN. DEPRATU said that the first thing that should be done, just to show the positive intent of this subcommittee, is to request **Mr. Heiman** to begin work on language that would indicate that any

tax relief that is provided by any proposed legislation would require a vote of the public to reimpose or increase. Also, this committee recognizes that the limit is 4% as stated in the Constitution.

SECTION 1, Definitions, no change.

SECTION 2, Imposition and rate of sales tax and use tax -- exceptions:

SEN. DEPRATU said that he felt that the sales tax on motor vehicles should be collected by the county treasurer rather than the seller at the time of registration of the vehicle, to ensure that it is collected on all motor vehicles. **Mr. Heiman** said that there is a particular provision dealing with motor vehicles in Section 72, page 33, line 30, so that would take care of that question.

SEN. STANG referred to Section 2 (5) (a) and the mention of 61-3-502, and **Mr. Heiman** said that is a section of the current sales tax, but is amended to conform to the new sales tax. **SEN. STANG** asked if this would eliminate the new car sales tax, and **Mr. Morris** referred to Section 72, page 34, line 6, the tax on new cars is 4% and the distribution is 37.5 and 62.5, which maintains the constancy of the current rate.

SEN. DEPRATU asked whether (5) (a) on page 5 is referring to all types of motor vehicles, such as motorhomes, et cetera, and **Mr. Heiman** said that the rest are tax exempt because they have a fee in lieu of tax. **Mr. Morris** pointed out that they would still pay a sales tax under a separate section. **SEN. STANG** asked if there was a sales tax on used cars also, and **Mr. Heiman** said that Section 73 talks about used cars, and it is paid on the difference.

Section 3, Presumption of taxability -- value -- rules:

SEN. STANG asked if liquor stores or warehouses that sell for resale are addressed somewhere in the bill, and **Mr. Heiman** said those are not covered by the retail sales tax, that Section 3 is the presumption. It lays the groundwork. **SEN. STANG** reiterated that everything is taxed unless they get a certificate or something later on in the bill, and **Mr. Heiman** said that was correct.

SEN. DEPRATU asked how that applies to attorneys, and **Mr. Heiman** said they are covered because they are a service. **SEN. DEPRATU**

then asked about advertising, and **Mr. Morris** said that it is taxed.

SEN. ELLIS asked about bank service fees, and **Mr. Morris** said specifically exempted would be what are called FIRE provisions, finance, interest, real estate.

Section 4, Separate statement of tax -- no advertising to absorb or refund tax:

SEN. DEPRATU said he read Section 4 as meaning a person cannot advertise "no resort tax," meaning that the company absorbs the tax, and this prevents that. It has to be itemized as a separate item.

Section 5, Liability of user for payment of use tax, no change.

Section 6, Collection of sales tax and use tax -- listing of business locations and agents -- severability:

SEN. DEPRATU asked whether the state can collect on sales of a telemarketer that moves into the state, and **Mr. Heiman** said that is a nexus problem. They have to have some kind of connection in the state. **SEN. STANG** asked if they have a building in the state, would they have to pay a tax on their out-of-state sales also, and **Mr. Heiman** said that would be apportioned under the multi-state apportionment.

SEN. STANG pointed out that because Montana does not have a sales tax, a Montanan does not have to pay the tax in Washington, but if a person were from Idaho, which has a sales tax, they would have to pay Washington's sales tax. **Mr. Morris** said in terms of offsets are dealt with in this section, and that you get a credit for whatever tax you pay. **Mr. Heiman** said this may not hold up in court without a physical location, but that it is a good idea to have it in the bill just in case, so the intent is clear.

SEN. DEPRATU asked about page 7, line 9, "any act that benefits from banking, financing, debt collection," et cetera, and **SEN. ELLIS** said he read that to mean engaged in the business of banking, financing, debt collection, telecommunication or marketing activities, and **SEN. DEPRATU** wondered if they would be taxed. **Mr. Heiman** said that seems to be aimed at the South Dakota-type situation, where you are not actually doing banking but you may be doing collection work or credit card operations. The fact that they are connected with banking does not mean that they are not taxable. **SEN. DEPRATU** asked whether you would collect a 4% tax on collecting a bad debt, and **Mr. Heiman** said

that you would not, but if for some reason some part of the operation had a fee, that could be taxed. He said that this bill has exempted financial activities, does not necessarily totally exclude all activities just because there may be some connection with financing. **SEN. STANG** asked for a clearer explanation of that portion, and **Mr. Heiman** said he would provide that information.

SEN. STANG asked what a seller's permit was, and **SEN. DEPRATU** said he assumed that would be a local business license, and that you cannot sell your business and have the license go with it.

Section 7, Nontaxable transaction certificate -- requirements:

Jeff Miller, Department of Revenue, said that Section 7 is a broad-based NTTC. Some of the other alternatives other states have looked at have been to try and specify the kinds of business inputs, but that takes you into a place of trying to be comprehensive in the list. So the advantage of that is that it is very narrowly focused and not so subject to abuse. However, the disadvantage is that you have to list everything for every kind of business. He said this is the most commonly prescribed approach. It has the pitfall of being able to be presented for just about any purchase, so it has that down side, but the advantage is that the seller makes a reasonable reliance on it that the person presenting it is going to use that purchase for their business. If that is not the case, that is an audit issue for the Department, not between the seller and the buyer.

Section 8, Nontaxable transaction certificate -- form, no change.

Section 9, Exemption -- government agencies -- exemption:

SEN. DEPRATU asked how Indian Tribes are exempt or how much they are exempt, referring to page 9, Section 9, and **SEN. ELLIS** said that he reads it that the Tribe would not have to pay, but an individual Tribal member would. **SEN. DEPRATU** reiterated, then, that if it was a Tribal purchase for the Tribe, they would not have to pay, because they are treated like any other governmental agency.

SEN. STANG mentioned that Tribes cannot be forced to collect the sales tax. He said that if a person bought a car on the reservation and licensed that car off the reservation, that is when the tax is paid. **SEN. DEPRATU** said that if a store on the reservation chose not to collect the tax, and a person made a purchase there, that person would not have to pay the tax, even though they may not be a Tribal member. **Mr. Morris** pointed out that in order to get Tribal tax collections, there has to be a

treaty with the Department of Revenue of the State of Montana.

SEN. ELLIS asked why a Tribe would enter into such an agreement, and **Mr. Miller** explained that the Blackfeet Indian Reservation has imposed a cigarette tax that mirrors the state tax. He said the Department collects it on their behalf, because the wholesalers who are selling cigarettes on the reservation stamp them with the Department's stamp, but based, then, on their per capita consumption, the Department simply writes a check to the Blackfeet Reservation because the Department collected their tax on their behalf. So their incentive to collect the tax would be that then they would enjoy sales tax revenues by imposing a tax on their own members and the state would assist in collecting that.

NOTE: **SEN. GLASER** entered the meeting.

Section 10, Exemption -- food products:

SEN. STANG said it appears that food products that can be purchased with food stamps probably should not be subject to the sales tax, and he was studying the language with that in mind. Referring to (d), he said that those items can be purchased with food stamps, as long as they are not heated on the premises. He asked if the Department could address how that is handled in other states. **SEN. STANG** said he was thinking about how hard it would be to implement and collect for the businesses. **SEN. DEPRATU** said he thought that was an important consideration, that simplification for the merchant was crucial.

SEN. STANG also referred to things like soap, paper towels, feminine hygiene products that cannot be purchased with food stamps but are necessities of life, and asked whether those would be taxed or not, and **SEN. ELLIS** said those would be taxed, but medicine and drugs would not be. **SEN. STANG** said that would be consistent with purchases with food stamps. **Mr. Miller** asked if it was **SEN. STANG'S** notion that what is trying to be accomplished is to carve out the categories of things that could be purchased or the actual purchases made with food stamps, because if it is carved out categorically, that would have a much broader impact, and **SEN. STANG** said that it should cover things could be or are purchased with food stamps. **Mr. Miller** said he understood that he did not want to tax purchases made with food stamps, but is that to say that if a person goes in to purchase that same item without food stamps, it would be taxed, or does he want that item completely out, and **SEN. STANG** said he wanted to take that item completely out so it is consistent. He said it doesn't matter who purchases that item, the cash register rings it up as food stamp purchasable, and that makes it easier to program the cash

registers. **Mr. Miller** said he would check to see how other states handle that.

Section 11, Exemption -- special supplemental food program for women, infants, and children, no change.

Section 12, Exemption -- prescribed medicine, drugs, and certain devices -- medical services, no change.

Section 13, Exemption -- wages, no change.

Section 14, Exemption -- agricultural products -- livestock feeding:

SEN. STANG asked whether unprocessed agricultural products would be grain, and **Mr. Morris** said it was. **SEN. DEPRATU** asked whether a mixture of oats and molasses to feed livestock would be considered processed, and **Mr. Miller** said Section 25 deals with that.

Section 15, Exemption -- gambling and amusement services, no change.

Section 16, Exemption -- insurance premiums, no change.

Section 17, Exemption -- dividends and interest, no change.

Section 18, Exemption -- fuel:

SEN. STANG asked whether the special fuel referred to diesel, and **Mr. Heiman** said it did. **SEN. DEPRATU** referred to (3), and said that propane would be taxed if it was for a grill, but if it was for a converted motor vehicle, it would not be taxed, but he wondered if he is required to pay a motor fuel tax, or is that vehicle tax free, and **SEN. GLASER** said that is covered when a person purchases their yearly permit from the Department of Justice for that vehicle in lieu of taxes.

SEN. STANG then asked if propane for heating would not be exempt, and **Mr. Miller** said that was correct. **Terry Johnson, Legislative Fiscal Division**, asked about diesel fuel that is used for heating, and **SEN. ELLIS** said he didn't think it was taxed. **SEN. STANG** said that all other forms of heating are taxed, and perhaps this should be also. However, it does read, "upon which tax has been paid or will be paid ... is exempt from the tax," and he assumed that that means if the tax has not been paid or won't be paid, then it is taxable, so that probably covers it. **Mr. Heiman** said that was correct. If you used special fuel for heating, it

would not be covered by the sales tax. **SEN. STANG** said he read it as being taxed. **Mr. Heiman** said he read it that if you don't use it on the highway, you don't pay the tax, and it would be subject to the sales tax.

Section 19, Exemption -- isolated or occasional sale or lease of property or services:

SEN. ELLIS asked whether that meant that if a person sells a used vehicle as an individual, it is not taxed, and **SEN. DEPRATU** said that in other sections it specifies that when the vehicle is licensed, the tax has to be collected by the county. **SEN. ELLIS** then asked if a loader sold off the ranch would not be taxed, and **Mr. Morris** said that was correct.

SEN. DEPRATU asked if implements are taxed for the farmer, and **Mr. Morris** said they were, and **SEN. DEPRATU** said, then, that if a farmer bought used and they were not taxed because they were not licensed, that could be a disadvantage to the implement dealers. **Mr. Johnson** asked about sales where an auctioneer is hired, and **SEN. ELLIS** said that the fee charged by the auctioneer would be taxable, but there is not a sales tax on the sale. **Mr. Miller** said that these would be isolated, infrequent, occasional kind of sales, and it is similar to a garage sale situation. However, the auctioneer would be providing a service, and that service would have a sales tax. **SEN. STANG** asked if the auctioneer would have to pay a sales tax on the items he sold, and **Mr. Miller** said he didn't think so. **SEN. DEPRATU** said that needed to be clarified, and the Department said they would find out what other states do in this instance.

SEN. GLASER asked about items that are sold at auction that might have been depreciated, and the problem that could arise where a person is paying the sales tax and capital gains tax on the same item. **SEN. DEPRATU** said the buyer would pay the sales tax.

SEN. STANG asked if this covered the occasional flea market where a charge is made for space, and how about the people at the flea market that are selling goods, and **SEN. DEPRATU** asked if that would cover art or craft fairs, and **Mr. Miller** said that those people are in the business of selling those products and therefore should be registered and collecting the sales tax, as compared to the occasional garage sale. **SEN. DEPRATU** asked if that should be clarified.

Mr. Miller said he reads page 11, line 26, to mean "occasional sales include sales that are occasional but not continuous and that are made for the purpose of fund raising by nonprofit

organizations, including but not limited to youth clubs, service clubs, and fraternal organizations," so the once-a-year sale fits into this exemption, but the person who follows the craft sales around the state is holding themselves out to be in business and is engaged in more than just an infrequent or occasional sale, and therefore would be taxable. **SEN. STANG** asked if that meant the Department would be at every craft sale or art fair to make sure that everyone was registered and collecting the tax, and **Mr. Miller** said that that has been a problem in other states.

SEN. STANG asked about the occasional sale of a piece of property, and it was decided that that is an occasional sale and would not be covered by the sales tax. However, if it were sold through an agent where a commission was involved, then the 4% is paid on the commission. **Mr. Heiman** said Section 33 on page 15, says the sale or lease of real properties or improvements is nontaxable.

SEN. DEPRATU then asked if the sales tax is then being paid on the commission, and **Mr. Heiman** said that is the way he would interpret that.

Section 20, Exemption -- oil, gas, and mineral interests, no change.

Section 21, Exemption -- minerals -- exceptions:

SEN. GLASER said that it exempts platinum and palladium, but does not mention other precious metals, and **SEN. ELLIS** pointed out that those are exempted in 15-38-103, which refers to silver, gold, et cetera. **Mr. Johnson** asked if that included talc, and **SEN. ELLIS** said it did. **Mr. Johnson** then asked about fertilizer, and **SEN. DEPRATU** said that was covered under another section.

Section 22, Exemption -- personal effects:

Mr. Miller explained that this covers someone moving into the state.

Section 23, Exemption -- printed material -- advertising services:

SEN. STANG said that magazines and books cannot be purchased with food stamps, and so are taxed on the resort tax. He said he opposed this exemption and asked if the committee would consider an amendment. **SEN. DEPRATU** said he had a conflict of interest, regarding advertising, because if this is not exempted, it is worth \$1,000 a month to him for advertising, and **SEN. ELLIS** asked

if advertising were exempted in other places, and he was told that this is the section that covers advertising.

Motion: SEN. STANG moved THAT MAGAZINES AND BOOKS BE DELETED FROM THE EXEMPTION.

Discussion:

SEN. DEPRATU said he opposed it only from one standpoint, and that is that this could be one of the lightening rods that would help defeat this sales tax measure, because the argument was made in Whitefish that books help teach children to read and shouldn't be taxed.

SEN. GLAZER said that his concern has to do with the local bookstores competing with Amazon.com, and others on the internet, where no tax is paid, and the sales tax would add to the disadvantage of the local bookstores.

SEN. STANG WITHDREW HIS MOTION.

Section 24, Exemption -- day-care services, no changes.

Section 25, Exemption -- feed, fertilizers, and agricultural services:

SEN. DEPRATU said this is the section that covers feed and fertilizer. SEN. STANG asked about Christmas trees, and whether it should be clarified as to live or natural trees.

Motion/Vote: SEN. STANG MOVED TO AMEND SECTION 25 (D) TO READ LIVE OR NATURAL CHRISTMAS TREES. Motion carried 3-0.

SEN. STANG then asked about (n) water for commercial irrigation and whether it was agricultural. Mr. Johnson asked what soil conditioners were, and he was told it was like peat moss. SEN. GLASER noted that pesticides were not on this list. Mr. Heiman said that if they were used in commercial operations and the farm owner had the transfer certificate no matter what he bought, it is tax exempt. SEN. DEPRATU said that it seemed to him that if the others are listed, pesticides should be listed just for clarification.

Motion/Vote: SEN. STANG MOVED TO AMEND SECTION 25 TO ADD PESTICIDES. Motion carried 3-0.

SEN. STANG asked what an agricultural service is, and **SEN. GLASER** said that would be like spreading fertilizers, combine services, haying on share, aerial spraying.

SEN. DEPRATU said he thought things like black dirt and those types of things should be reconsidered because most of that is used in construction of a new home or improvements. He wondered if it should be exempted because it is used in construction or for enhancing an area, and after some discussion, it was decided that this would be exempted under construction. **SEN. STANG** pointed out that if an individual bought topsoil to plant grass, it would be taxed, but if a contractor buys it in the construction and completion of a home, that is exempt. **SEN. DEPRATU** suggested that it should be added under soil conditioners.

SEN. GLASER then asked how sod would be handled, and **Mr. Heiman** said for taxing purposes it is determined whether it is a retail sale or not. After discussion, it was decided that this covered the situation well enough.

Section 26, Exemption -- certain chemicals, reagents, and substances:

SEN. ELLIS asked whether the Stillwater Mine would be taxed on the explosives, blasting material, or dynamite, and their equipment, and after some discussion, **SEN. STANG** asked the Department to get information on how other states handle sales tax for mining operation equipment and explosives.

Section 27, Exemption -- sale of certain services of mining or manufacturing, no changes.

Section 28, Nontaxability -- sale of property for resale:

Mr. Heiman said this section seems to say that a person can buy from one wholesaler and then that person has to sell it at retail, and does not allow for sale to a second wholesaler, and **SEN. DEPRATU** asked if that needed to be clarified. **Mr. Heiman** said that this seems to prohibit manufacturing, where a person buys a product to manufacture something, and then could not sell it to a wholesaler, that it would have to be sold at retail. **Ms. Bryson** asked if it was personal property, because it was not defined. **Mr. Heiman** said that real property is exempted in another section. **SEN. DEPRATU** asked **Mr. Heiman** to clarify that section.

Mr. Miller said that this is primarily goods for resale, and **Mr. Heiman** is pointing out that the way this reads, that can only happen once. The Department said they would clarify that and clarify that it is personal property.

Mr. Miller pointed out that the committee had been discussing exemptions and now are moving into nontaxable transactions, and that is significant because exemptions don't appear in the process, they are eliminated and not reported on the form, but nontaxable transactions are transactions that are a sale of an otherwise taxable item, but because of the nature of the sale, it is not taxable. The vendor in this instance is going to have to report the activity.

SEN. GLASER clarified that once a buyer gives a current certificate to the seller, they don't have to do that every time they buy another item, that it isn't a continuous, every-time thing as long as that current certificate is on file. **Mr. Miller** agreed that that is how that would typically work, that a certificate would be provided one time and that number would be recorded along with that sale.

Section 29, Nontaxability -- sale of service for resale, no changes.

SEN. DEPRATU asked if Section 29 had some of the same questions as far as whether services could be resold, and he suggested that that same distinction be made in this regard as well.

Section 30, Nontaxability -- sale to miner or manufacturer:

SEN. STANG asked whether mining equipment is not taxed, and **SEN. GLASER** said that was correct, if it was part of the end product, and **SEN. ELLIS** added "or if it is abandoned in place." **Mr. Johnson** asked if electricity, as in the case of the Columbia Falls Aluminum Plant, was covered somewhere else, and **Mr. Morris** pointed out that it is covered by item (2).

Section 31, Nontaxability -- sale of tangible personal property for leasing:

SEN. DEPRATU asked whether this covered the rent-to-own situation and rental of various equipment from rental places, and **Ms. Bryson** said she reads (2) as saying that if it is 50% or more of their business, they are exempt. **SEN. STANG** said if it was a business, they would have a certificate, but if an individual rents something, it is taxable because it is not a business expense. **SEN. DEPRATU** agreed that if he rented from a local

rental shop, he would have to pay the tax on the rented equipment. **Mr. Miller** added that if a person should buy a rental business, it is not taxable because that person is going to derive more than 50% of his business by renting that equipment.

SEN. DEPRATU asked how this affects the rental car company that buys a car for rental purposes and whether those would be taxed, and **Ms. Bryson** said that those would be exempt under (2).

Section 32, Lease for subsequent lease:

Ms. Bryson asked where it says "other than furniture or appliances," whether that means that those lease transactions are subject to the tax, and **SEN. DEPRATU** said that the furniture and appliances which would be like the rent-to-own stores and would be taxed, but coin-operated machines are not taxed.

Section 33, Nontaxability -- sale or lease of real property or improvements and lease of mobile homes, no changes.

Section 34, Nontaxability -- transactions in interstate commerce -- certain property used in interstate commerce -- exception:

Mr. Johnson asked how all the internet stuff falls into this, and **Mr. Miller** said that it would be addressed up front where we started talking about what is activity that constitutes a sufficient presence to make a person taxable, so an economic threshold concept is what we're trying to get here, and this starts with the presumption that these activities will presume that you will be taxable and required to register, which is one thing to presume and quite another to accomplish. Again, to the extent that you have an internet seller or a remote seller who is engaged in the state of Montana, has a market share, has a physical presence, has a warehouse or something else, it is no problem, but if their only contact is just across the net or through the mails, then there is a substantial issue in terms of trying to reach these people.

SEN. STANG said that we are going to try to tax them, but they are probably going to tell us we can't. **Mr. Miller** said the courts have been siding with them. There are national efforts to try and bring this to a new day and a new discussion point. There is a whole myriad of issues that prevent solving this issue in a way that the internet sellers and remote sellers would agree to participate in a solution, so that effort is ongoing. There is also the possibility that Congress will do something about this. The courts have not been sympathetic to the states who have attempted to assert jurisdiction.

Ms. Bryson added that the Department would also like to propose some amendment to add some language that about once a determination is made about whether that entity is subject to collecting and remitting the tax on behalf of the state of Montana, that if that determination is made, that it doesn't go retro, but is prospective. That would help make a court be more open to the notion of doing that.

SEN. DEPRATU asked the Department to provide that language, and **Ms. Bryson** said they would.

Mr. Johnson then asked if internet service providers would be taxed, and **Mr. Miller** said that yes, because they have a local presence, but **Ms. Bryson** said they could not be taxed under the Internet Tax Freedom Act, that those access fees are not taxable. **Mr. Johnson** asked about internet service providers who provide other services, and **Ms. Bryson** said that is where you define whether that is a service and what is taxable.

SEN. GLASER said that one problem with the internet, there are only some providers that are actually profit entities because the internet consists of universities and governments as well. It is a very complex issue. **Ms. Bryson** said that businesses like Amazon.com could be convinced to collect the tax on your behalf. **Mr. Miller** said that the Internet Tax Freedom Act does not prohibit taxing the sale across the net, but that a state can't bring up a new tax if it wasn't already in place on just internet access.

Mr. Heiman said that there may be some way, as the rest of the states are putting their sales tax things in order, that maybe Montana can get in there and take some advantage of the situation where we have a differential sales tax or some kind of a sales tax that would encourage Amazon.com to have their warehouse in Montana. It could be an advantage rather than a disadvantage.

Mr. Miller said the Department would provide update information of what these projects are doing nationwide so that as we go through this exercise the first time, we can learn from their experiences and try and stay in step with whatever it is they are recommending.

ADJOURNMENT

Adjournment: 11:55 A.M.

SEN. R. L. DEPRATU, Chairman

SANDY BARNES, Secretary

GD/SB

EXHIBIT (tas39bad)